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IN THE

Supreme Court of the United States

October Term 1964

No. 682

NATALE EVOLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
The Opinion Below	1
The Grounds of Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Appendix A	9

Cases Cited

Petitioner respectfully incorporates by reference on his behalf all the cases cited in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial on newly discovered evidence upon remand from the United States Supreme Court, 375 U.S. 32.

The Opinion Below

The opinion of the Court of Appeals was decided on October 16, 1964 and is not as yet reported.

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on October 16, 1964.

(ii) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review

The petitioner Natale Evola and the petitioner Vito Genovese were defendants in the same trial, both are involved in the proceedings herein and are seeking review of the same judgment and opinion of the Court of Appeals. The issues are substantially the same and the petitioner respectfully incorporates by reference on his behalf all the questions presented for review in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

Constitutional Provisions

Petitioner respectfully incorporates by reference on his behalf all the constitutional provisions set forth in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

Statutes Involved

Petitioner respectfully incorporates by reference on his behalf all the statutes involved set forth in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

Statement of the Case

(Our statement of the case in this petition is abbreviated because a full statement, which we hereby adopt, is presented in the petition of Vito Genovese. Except as otherwise indicated, all of our recitals of fact *infra*, are taken from the opinions of the Courts below which were cited *supra* under the heading "Citations to Opinions Below".)

Petitioner Evola and the other petitioners herein were convicted, after a three months' jury trial in the Southern District of New York, of conspiracy to violate Federal narcotic laws. Their convictions were affirmed by the Court below (274 F. 2d 179), and this Court denied certiorari (*Evola* v. *United States*, 362 U. S. 974, 982, rehearing denied, *Genovese* v. *United States*, 363 U. S. 858).

The aforementioned convictions occurred on April 17, 1959. On August 26, 1960, the within petitioners (including Evola) moved in the District Court for a new trial pursuant to Rule 33, F. R. Cr. P. The grounds of those motions for new trial were (as summarized in the opinion of the Court below on the judgment here sought to be reviewed—315 F. 2d at p. 188):

> " • • • (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial tes-

timony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli and Muglia, in violation of the Jencks Act, 18 U.S.C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U.S.C. § 3500."

District Judge Bicks, who had presided at the original narcotics trial, conducted hearings upon the motions for new trial, and he denied those motions insofar as they rested upon grounds 1 through 6 as above quoted (197 F. Supp. 536). Judge Bicks reserved decision as to the above quoted ground no. 7—involving the Shaw interview notes—indicating that he intended to take further testimony on this issue. Judge Bicks becoming ill, such further testimony, which was to have been taken by *voir dire* examinations, was not taken before Judge Bicks. Instead, District Judge Murphy was assigned to the further conduct of the hearing and to make a determination as to the ground upon which Judge Bicks had reserved decision. Thereafter Judge Murphy denied the motions for a new trial (200 F. Supp. 711). On appeal to the United States Court of Appeals for the Second Circuit, Judge Bicks' rulings and Judge Murphy's order denying the motions for a new trial were affirmed (315 F. 2d 186). The within several companion petitions for certiorari seek review of the last-mentioned judgment of affirmance.

We shall not burden the Court with factual recitals concerning the issues presented by the above quoted new trial grounds 1 through 6—as to which the Court below affirmed (315 F. 2d at p. 188) on the opinion of Judge Bicks (197

F. Supp. 536) without further discussion—because this aspect of the case is sufficiently treated in the companion petition of Vito Genovese. Although the Genovese petition likewise treats the above quoted ground no. 7—relating to the Shaw interview notes—we shall refer briefly herein to that part of the case.

As noted in the opinion below (315 F. 2d at p. 189), Judge Murphy had separated the Shaw material into three groups, the second and third of which are referred to as follows in the opinion below (*ibid*):

> "(2) Materials which were 'probably Jencks' statements.' Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed 'the great majority' of Shaw's original interview notes, was nonprejudicial to appellants on the ground that 'virtually the [ir] entire contents' 'correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense.'
>
> (3) Notes which 'most assuredly should have been produced pursuant to § 3500.' This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests in that defendants' cross-examination of Cantellops was not 'unduly restricted' thereby:
>
> > '* * * this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a

> loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occasion * * * would simply add umber to an already blackened witness.' 200 F. Supp. at 717."

In the appeal below it was contended on the part of the within petitioners (including Evola) that, as regards the portion of the Shaw materials which Judge Murphy found "probably Jencks statements" but "virtually" consistent with the Grand Jury testimony, numerous discrepancies did in fact exist between the Shaw notes and the Grand Jury minutes (Brief in the Court below on behalf of Vito Genovese at pp. 65-97); and as to the portion of the Shaw materials which Judge Murphy found "most assuredly should have been produced" but whose non-production he found non-prejudicial, the within petitioners urged in the Court below that Judge Murphy had misapplied the test of harmless error laid down in *Rosenberg* v. *United States*, 360 U. S. 367, 370 (Brief of Genovese just cited, pp. 15-59).

The Court below did not reach the question of the consistency of the "probably" producible Shaw materials with the Grand Jury testimony, nor did it reach the question of the prejudicial effect of non-production of the "most assuredly" producible items, because, instead, the Court below resolved the issues of the appeal in regard to the Shaw materials by arriving at a *de novo* finding of its own to the effect that neither the Shaw materials which Judge Murphy had deemed "probably" producible nor those which he had deemed "most assuredly" producible were actually producible at all under the Jencks Act. In support of this

conclusion, the Court below stated (315 F. 2d at p. 191—footnote omitted):

> "In ruling that the October 10 and 11 notes were Jencks 'statements,' and that the great majority of Shaw's other original interview notes were probably 'verbatim recitals' within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions. As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below."

Having thus determined that its powers of review allowed it to make independent findings on the issue of producibility, the Court below went on in its opinion herein to conclude that the Shaw materials were not "a substantially verbatim recital" because, *inter alia,* Cantellops' speech was difficult to understand and transcribe, the Shaw notes were not read back to Cantellops, Cantellops never signed nor initialed them, some of the notes did not deal solely with Cantellops' statements, Mr. Shaw's practice had been to edit and add to the notes, and Mr. Shaw had been selective in his note-taking (315 F. 2d at pp. 191-192).

The importance, to petitioner Evola, of the opportunity which would have been afforded at the narcotics trial to adduce further impeachment of the credibility of Cantellops with the aid of the Jencks Act materials held nonproducible by the Court below and non-prejudicial by Judge Murphy (who, however, as seen, had held them producible), may be

gathered from various statements in the two opinions written by the Court below in this case (274 F. 2d 179 and 315 F. 2d 186), where Cantellops' central and principal role as the Government's indispensable accusing witness, as well as his base credibility, are repeatedly noted. And, we respectfully emphasize, it is undisputed that, except for the testimony of the basely discredited accomplice witness Cantellops, there is not so much as a scintilla of evidence inculpating the petitioner Evola under this single-count conspiracy indictment.

Reasons for Granting Writ

Petitioner respectfully incorporates by reference in his behalf all of the contentions and citations set forth in the petition of Vito Genovese who has filed a petition for similar relief as though fully set forth herein without restatement of the same.

I respectfully submit, therefore, that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the conviction of petitioner.

Respectfully submitted,

MAURICE EDELBAUM,
Attorney for Petitioner.

APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of October one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO AVILES, et al.,

Defendants,

CHARLES BARCELLONA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk